Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-489

MARIO MEROLA,

Petitioner,

v.

HOWARD E. BELL and ROBERT DAVIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner, Mario Merola, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on July 9, 1979.

Opinion Below

The opinion of the New York Court of Appeals is reported at 47 N.Y.2d 985 and appears in Appendix "A" hereto. The opinions of the Appellate Division, First Department, are reported at 68 A.D.2d 24 and appear in Appendix "B" hereto.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 9, 1979, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether the closure of the pretrial suppression hearing to the public and press in the first murder prosecution of a 13-year-old defendant under a new State juvenile offender law violated the First Amendment by depriving the public and press of their right to know how this controversial law is working.

2. Whether the defendant's waiver of his Sixth Amendment right to a public trial because of publicity about his case authorizes closure of the courtroom where the prosecutor opposes closure and asserts a legitimate public interest in holding open courtroom proceedings.

3. Whether the New York Court of Appeals misapplied this Court's decision in *Gannett Co.* v. *DePasquale,* —— U.S. ——, 47 USLW 4902 (No. 77-1301, decided July 2, 1979) to sanction the closure, although the prosecutor opposed closing the courtroom.

Constitutional Provisions Involved

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Robert Davis is the first 13-year-old arrested and charged with murder under the newly-created juvenile offender provisions of New York [hereinafter referred to as juvenile offender law]. He has been charged with the murder of John Hernandez, which occurred on September 19, 1978, on a New York City subway platform located at 225th Street and White Plains Road in Bronx County (166).*

On March 19, 1979, Davis's attorney, Stanley Green, made an oral motion to suppress statements made by Davis to law enforcement officials. He also moved to exclude the press from the suppression hearing on that date, and the motion was denied by respondent HOWARD BELL, Justice of the Supreme Court of the State of New York, Bronx County (40).

On the following day, March 20th, Justice BELL indicated that he had reconsidered his decision to exclude the press from the hearing because of one television newscast and one radio newscast he had heard. The defense immediately renewed its motion to close the courtroom (40-46, 59).

The court heard argument from Mr. Green in support of the motion, and from Bronx County Assistant District Attorney Mary Beth Abbate against the motion (61-65).

* Numerical references are to the Record on Appeal in the Court of Appeals.

The prosecutor argued:

> This particular case is not a case in which the public's interest is one of merely curiosity.
>
> It is not a vile murder in the sense of lurid details.
>
> It is not a love triangle case.
>
> It is not a case involving anybody famous, where the facts are the reason that the public would be interested in knowing.
>
> Rather, it is a case of historical importance, at least in the legal and legislative sense.
>
> The case which is going before your Honor is the first case in the history of New York, to try a 13-year-old for murder.
>
> It is a case involving differing philosophies of law, different philosophies of social conduct, and dealing with people within the system of justice.
>
> Now, the legislature in changing the law to allow a 13 year-old to be tried for murder shows one particular philosophy: It was a hotly debated, hotly contested issue in which all of the People of New York were interested.
>
> Their interest comes from that philosophical change, from the philosophical direction in which the laws and the legislation's intent is going to go.
>
> It is not a case in which the basic interest, whether it be TV, curiosity of the People are aroused—it is rather one of historical importance, it is one in which the People want to know, and they have spoken in passing this legislation—wants to know whether 13 year-olds can and should and are being dealt with properly in the adult system.
>
> The interest in this involves interest in legislative determinations, legislative actions, judicial determination and, of course, penal interests.
>
> It is our position that certainly in this case more than any other case that has ever gone before, the People should be given the right to know and they're given the right to know by way of the Press, and to exclude

> them is to say the people have no right to know what is happening as a result of their legislative interests, and we suggest the Press should not be excluded. The motion should again be denied.

(63-65).

Justice BELL then invited reporters seated in the courtroom to contact an attorney, and, subsequently, Rudolph Giuliani, Esq., appeared in behalf of the *New York News* (69, 74). Mr. Giuliani argued against closure of the courtroom (97-101). Justice BELL, conceding that "there hasn't been that much publicity with respect to this case," nevertheless, granted the motion to close, because "I don't know what the press is going to do tomorrow or this afternoon if I ever get around to it, I don't know what the person's going to do tomorrow morning with respect to what they might see on that T.V." (101-02).

Mr. Giuliani requested that Justice BELL reconsider his decision and allow the press and public to attend the first day of the hearing to evaluate the prejudicial impact of any publicity (123). Justice BELL denied the application and stated that he thought the District Attorney should take the matter up to the Appellate Division of the Supreme Court (131). With the consent of all the parties, Justice BELL ordered that all proceedings in the criminal case be stayed until the Appellate Division reached a determination in a proceeding to prohibit the justice from closing the courtroom (169).

On March 23, 1979, MARIO MEROLA, District Attorney of Bronx County, initiated a proceeding, under Article 78 of the New York Civil Practice Law and Rules, against Justice BELL and ROBERT DAVIS to prohibit closure of the court proceedings to the public and press (165). The *New York News* also initiated an Article 78 proceeding against the same respondents seeking the same relief (31).

On May 10, 1979, the Appellate Division, First Department, in a three-to-two decision, denied both applications and dismissed the petitions. *Matter of Merola* v. *Bell,* 68 A.D.2d 24 (1st Dept. 1979). The majority opinion by Associate Justice Joseph Sullivan found that the case had "attracted widespread publicity," because the defendant was the first thirteen-year-old to be prosecuted as an adult for murder and because the case involved a homicide at a New York City subway station. Justice Sullivan's concern about possible publicity in the case was heightened because:

> at the time the hearing was to commence, public officials in the City of New York were engaged in a well-publicized campaign against crime in the subways, after the occurrence of a series of violent crimes. Obviously, this served to focus more attention on the prosecution of defendant.

Id. at 27.

Citing newspaper articles and news broadcasts which had taken place some five months before the date the suppression hearing was to commence, one television newscast which took place the night before the scheduled hearing, and one radio broadcast and one newspaper article about the case on the date of the scheduled hearing, and noting that there were several reporters in the courtroom when the hearing was scheduled to commence, Justice Sullivan concluded that "it is highly unlikely that the details of a

confession to what was apparently a cold-blooded and vicious crime will escape the attention of most potential jurors in Bronx County, an area which has been battered by the trauma of violent crime." *Id.* at 29. The majority emphasized that the New York Court of Appeals decision in *Gannett Co.* v. *DePasquale,* 43 N.Y.2d 370 (1977), "fixed the judicial responsibility" to close the courtroom.* *Matter of Merola,* 68 A.D.2d at 29.

In a brief concurring opinion, Associate Justice Sandler found the question presented "both close and difficult," but concluded that "[t]he public right to know the details of a confession that may ultimately be judicially determined to have been unconstitutionally obtained seems to me to be outweighed by the defendant's right to a fair trial, particularly where the defendant is 13-years-old." *Id.* at 30. In a separate concurring opinion, Associate Justice Lupiano concluded that closure here was a limited one and was warranted by the decision in *Gannett.* He also endorsed the trial court's closure decision "as a proper exercise of discretion." *Id.* at 31-32.

Associate Justices Silverman and Ross, in an opinion by Justice Silverman, dissented. They observed that the *Gannett* case was "controlling" and that they were "of course bound by the decision . . . ." *Id.* at 32-33. Emphasizing that "the public has a right to know how the new juvenile offender statutes are working in practice, including the applicability of suppression issues to cases where the defendant is 13-years-old," the dissenters concluded that "we do not think that the risk of prejudicing the defendant's right to a fair trial is great enough to warrant closing the courtroom in the present case." *Id.* at 33-34. *Gannett,* the dissenters declared, involved "intensive, prolonged, and pervasive publicity" about "a murder of a prominent citizen and public official" in a county "with a population of 36,000 people." *Id.* at 34. Here, they pointed out:

> [T]he county is Bronx County with a population of approximately 1½ million; the crime is unfortunately not an uncommon one in the City of New York or in Bronx County—robbery and a murder in the course of the robbery. The crime is alleged to have taken place in the subway, and at the moment subway crime is receiving increased publicity. Neither the defendant nor the victim is a prominent public figure; there is nothing to indicate that either one of them is widely known.

Id.

On May 11, 1979, petitioners Merola and the *New York News* appealed to the New York Court of Appeals, which unanimously affirmed the judgment on the majority opinion of the Appellate Division. The Court of Appeals observed that "[a]lthough it was of course perfectly correct for the court to offer to furnish redacted transcripts to the press, it would have been the non-delegable responsibility of the hearing court itself to perform any necessary redaction."* The Court of Appeals indicated that the trial proceedings should not have been stayed while the closure order was attacked on appeal.

On August 10, 1979, defendant Davis entered a plea of guilty to the crime of Felony Murder (N.Y. Penal Law § 125.25[3]), and his case was removed from the Supreme Court, Bronx County, to the Family Court for disposition.

* The Appellate Division's decision was rendered while the *Gannett* case was still pending before this Court.

* The trial court had suggested that redaction of the transcripts issued to the press be done by defense counsel and the prosecutor.

Reasons for Granting the Writ

1. The decision below raises a significant issue concerning the public's right to know under the First Amendment how a new and controversial law is operating when access is denied to the pretrial suppression hearing in the first prosecution brought under that law's provisions.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975), this Court recognized the importance of public access to criminal proceedings:

> The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

In *Gannett Co.* v. *DePasquale,* —— U.S. ——, 47 USLW 4902, 4908 (decided July 2, 1979), this Court specifically left open the question whether the public and press have a First and Fourteenth Amendment right to attend public trials. This Court did not feel the need to address this important issue in *Gannett,* because the trial court there gave due deference to First Amendment interests and because there was not an absolute ban on access since transcripts of the hearing were subsequently made available to the press and public.

Here, however, the situation is drastically different. Virtually all of the State court judges considering the issues presented in the instant case have felt *bound* to close the pretrial suppression hearing because of the *Gannett*

decisions (first in the New York Court of Appeals and then in this Court). Indeed, the language employed in the *Gannett* decisions appears so sweeping* that the lower courts have not been giving due deference to the First Amendment interests involved. Here, the New York Court of Appeals affirmed closure of the courtroom on the majority opinion of the Appellate Division of the Supreme Court, which sanctioned closure because "the *Gannett* Court fixed the judicial responsibility." *Matter of Merola,* 68 A.D.2d at 29.

Unlike in *Gannett,* moreover, the ban on public access has proved to be absolute. Following the New York Court of Appeals decision, no suppression hearing was ever conducted.** While other courtroom proceedings have been conducted, which have been open to the public and press, there has been no trial and, thus, no opportunity for the public to hear the evidence in this matter. As Chief Justice Burger observed in his concurring opinion in *Gannett*:

> In the entire pretrial period, there is no certainty that a trial will take place. Something in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas, frequently after pretrial depositions have been taken or motions to suppress evidence have been upheld.

Gannett, supra at 4910.

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* "At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, *pretrial evidentiary hearings in this state are presumptively to be closed to the public.*" *Gannett Co.* v. *DePasquale,* 43 N.Y.2d 370, 380 (1977) (emphasis added). "[W]e hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Gannett Co.* v. *DePasquale,* —— U.S. ——, 47 USLW 4902, 4908 (July 2, 1979).

** The controversy here is thus not moot. Even if the closure order had already expired, it seems apparent from the *Gannett* decision that the nature of the order and its likelihood of repetition warrant review. See *Gannett, supra* at 4904-05.

Where, as here, the criminal prosecution terminates in a guilty plea and no suppression hearing has been conducted, the public never has the opportunity to review the evidence against the accused. The First Amendment interest should, thus, be of paramount concern to this Court. If closure of pretrial suppression hearings in all criminal cases becomes common practice (and we respectfully submit that the case is indicative of what is becoming common practice as a result of the *Gannett* decisions), then the public will be denied access to meaningful information about criminal prosecutions in the majority of cases.* While the defendant's Sixth Amendment right to a fair trial must, of course, be protected in the minority of cases which ultimately do result in a trial, the lower courts must respect the public's First Amendment right to information about the overwhelming majority of cases in which trials never take place.

The first criminal prosecution of a 13-year-old for the crime of murder under a new state statute authorizing adult prosecutions of juvenile offenders is clearly a case of genuine and significant public interest. As the dissenters in the Appellate Division observed:

> [T]he public has a right to know how the new juvenile offender statutes are working in practice, including the applicability of suppression issues to cases where the defendant is 13-years-old.

Matter of Merola, 68 A.D.2d at 33-34.

* While the majority opinion in *Gannett* asserted that the press and public had "a full opportunity to scrutinize the suppression hearing" when a transcript was made available, such scrutiny rarely takes place. The release of dated transcripts is rarely newsworthy. Moreover, the exclusion of the public constitutes an absolute bar to their being able to assess the credibility of live testimony and the actual performance of public officials.

The obviously controversial nature of this statute makes it imperative that the public interest in securing full and accurate information concerning its implementation be jealously guarded. The legitimacy of this interest must be recognized in this case, so that in future cases trial judges will pay due regard to the First Amendment before deciding whether a pretrial hearing should be closed to the public.

2. The decision below erroneously applied this Court's decision in *Gannett* to sanction the closure, although the prosecutor here opposed closing the courtroom.

In *Gannett,* this Court specifically addressed the issue "whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial." The New York Court of Appeals relied upon the *Gannett* decision in justifying the closure here despite the fact that the prosecutor has vigorously and consistently objected to the closure, asserting an overriding public interest in opening the courtroom to the public and the press.

Since "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation" (*Gannett, supra* at 4906), this Court has designated the prosecutor as the party with primary responsibility in this regard:

> The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial.

Id.

Thus, a significant question is presented as to whether a pretrial suppression hearing must be closed where the defendant seeks to waive his Sixth Amendment right to a public trial, but the prosecutor opposes the application, asserting an overriding public interest in the proceedings remaining open.

Since the Sixth Amendment requires a balancing of the conflicting interests involved in the defendant's waiver of his right to a public trial and the public's right to know how a new and controversial law is working—a right here asserted by the prosecutor—the decision below is clearly erroneous if that balancing is to have real meaning. For given the level of publicity at the time the trial court ordered closure and the size of the potential juror pool in Bronx County, New York, the possibility that the defendant could not receive a fair trial because of extensive publicity was non-existent. Indeed, the trial court commented:

> I will concede or agree with you there hasn't been that much publicity with respect to this case. We haven't had the glaring headlines that you would receive in certain cases.

(28).

The dissenters in the Appellate Division concluded, moreover, that if closure were warranted here, then it would be warranted in most cases "where there is any publicity at all." *Matter of Merola,* 68 A.D.2d at 35. The sparse publicity here must also be considered against the dense population of about 1½ million people in Bronx County, New York. *Id.* at 34. A proper balancing of these interests would surely have resulted in a decision to keep the courtroom open to the public and press. The refusal of

the New York Court of Appeals to correct this erroneous determination warrants review by this Court.

Finally, this Court cannot ignore the aura of doubt which surrounds the sharply divided decision in the *Gannett* case. Are pretrial suppression hearings to be routinely closed to the press and public? May these hearings be conducted openly upon a showing of legitimate public interest in the proceedings? Where the prosecutor asserts that public interest, must the courts respect it? These important questions, still unresolved in the wake of the *Gannett* decision, are squarely presented in the instant case.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
Petitioner pro se

ALAN D. MARRUS
Assistant District Attorney
Of Counsel

September, 1979

APPENDIX

APPENDIX A

Opinion and Judgment of New York Court of Appeals

STATE OF NEW YORK—COURT OF APPEALS

1 No. 353

In the Matter of

MARIO MEROLA, &C.,

Appellant,

vs.

HOWARD BELL, a Justice of the Supreme Court, Bronx County, and ROBERT DAVIS,

Respondents.

In the Matter of

NEW YORK NEWS, INC.,

Appellant,

vs.

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, *et al.*,

Respondents.

(353) Rudolph W. Giuliani, N.Y. City, for appellant New York News, Inc.

Mario Merola, DA, Bronx County (Alan D. Marrus of counsel) appellant pro se.

Robert Abrams, Attorney-General (Robert J. Schack and Shirley Adelson Siegel of counsel) for respondent Bell.

Stanley Green, N.Y. City, for respondent Davis.

MEMORANDUM:

The judgments appealed from should be affirmed, with costs, on the opinion of Mr. Justice Joseph P. Sullivan at the Appellate Division, with the additional comments which follow concerning the procedures used by the trial court in this matter.

In this case it appears without doubt that there was a fulfillment of the requirements laid down in *Matter of Gannett Co* v *DePasquale* (43 NY2d 370, affd —— US —— [dec July 2, 1979]), where the court held that optimal coverage of an event can be achieved "consonant with constitutional free press guarantees, by affording the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing (citation omitted). Complete transcripts [may be] made available when the defendant's interests [are] no longer in jeopardy. The public's 'right to know' [is] then compatible with the defendants' right to a fair trial" (*Matter of Gannett Co* v *DePasquale, supra,* p 381). In the instant case the court held that if the press desired, the court would supply complete transcripts of the proceedings during the pretrial motions, except for the redacted portions of yet inadmissible admissions of the defendant. It continued by noting that the redacting "has to be done by the District Attorney and defense counsel because the court doesn't have the time". Although it was of course perfectly correct for the court to offer to furnish redacted transcripts to the press, it would have been the non-delegable responsibility of the hearing court itself to perform any necessary redaction.

Another matter requiring our comment was the trial court's decision to stay its proceedings pending the determination of this appeal. We granted a preference for ar-

gument of the appeal because the criminal trial remained in abeyance pending the appeal. Despite the expedited nature of the proceedings, the defendant's trial, which was scheduled to begin on March 20, 1979 has not yet started. Meanwhile he remains incarcerated, as he has been since September 22, 1978, awaiting the outcome of this collateral matter and the trial which must follow. Although we recognize the broad discretion of the trial courts to stay their own proceedings, we caution that the right of a defendant to a speedy trial is important and should not be sacrificed in the name of these collateral appeals. Only in rare situations, not present here, should a court stay trial proceedings to permit a challenge to rulings permitting the press and public to have redacted transcripts of pretrial suppression proceedings.

* * *

Judgments affirmed, with costs, in a memorandum. Concur: Cooke, Ch.J., Jasen, Gabrielli, Jones, Wachtler and Meyer, JJ. Fuchsberg, J., taking no part.

Decided July 9, 1979

APPENDIX B

Opinions and Judgment of the Appellate Division of the Supreme Court, First Department

Order 5074 Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 10, 1979

Present:

Hon. Leonard H. Sandler, *Justice Presiding*
Joseph P. Sullivan
Vincent A. Lupiano
Samuel J. Silverman
David Ross *Justices*

5074

[M-1242]

In the matter of the application of MARIO MEROLA, in behalf of the People of the State of New York,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Law and Rules,

against

HOWARD E. BELL, a Justice of the Supreme Court, Bronx County and ROBERT DAVIS,

Respondents.

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and Rules, in the nature of a writ of prohibition and mandamus, vacating and prohibiting the enforcement of an order of respondent Bell which excluded the public and press from attendance at the pre-trial suppression hearing in a criminal action involving respondent Davis,

And said proceeding having been argued by Mr. Mario Merola, petitioner, *pro se,* and Mr. Alan D. Marrus, of counsel for the petitioner, and by Messrs. George D. Zuckerman and Robert J. Schack, of counsel for the respondent Bell, and by Mr. Stanley Green, of counsel for respondent Davis; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the application be and the same hereby is denied, and the petition dismissed without costs and without disbursements. [All for Opinion by Sullivan, J., including Sandler, J.P. and Lupiano, J., who also concur in separate Opinions; Silverman and Ross, JJ. dissent in an Opinion by Silverman, J.]

ENTER:

Joseph J. Lucchi
Clerk.

Opinion of Sullivan, J. (pp. 10-20)

SUPREME COURT, APPELLATE DIVISION

First Department, March 1979

Leonard H. Sandler, P.J.,
Joseph P. Sullivan,
Vincent A. Lupiano,
Samuel J. Silverman,
David Ross, JJ.

5074

[M-1242]

In the matter of the application of MARIO MEROLA, in behalf of the People of the State of New York,

Petitioners,

for an order pursuant to Article 78 of the Civil Practice Law and Rules,

against

HOWARD E. BELL, a Justice of the Supreme Court, Bronx County, and ROBERT DAVIS,

Respondents.

5075

[M-1243]

Matter of NEW YORK NEWS, INC.,

Petitioner.

for a judgment under Article 78 of the C.P.L.R. in the nature of prohibition,

against

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, presently presiding in the Trial Term, Part XVI, Supreme Court, Bronx County, and ROBERT DAVIS,

Respondents.

Applications for writs of prohibition pursuant to Article 78 of the Civil Practice Law and Rules.

Alan D. Marrus of counsel for petitioner Mario Merola, District Attorney, Bronx County, State of New York

Robert J. Schack of counsel (George D. Zuckerman with him on the brief; Robert Abrams, Attorney General of the State of New York) for respondent Hon. Howard E. Bell

Stanley Green, attorney for respondent Robert Davis

Rudolph W. Giuliani of counsel (Robert D. Sack, Kenneth A. Caruso and Frederick D. Friedman with him on the brief; Patterson, Belknap, Webb & Tyler, attorneys) for respondent New York News Inc.

5074—MATTER OF MARIO MEROLA v. HON. HOWARD E. BELL

5075—MATTER OF NEW YORK NEWS, INC. v. HON HOWARD E. BELL

SULLIVAN, J.

On September 19, 1978, John Hernandez was shot and killed on a subway platform in the Bronx, after he had been followed off a train by three youths who were haranguing him and demanding money. Three hours later defendant, Robert Davis, 13 years of age, was picked up by the police as a suspected runaway. During questioning he told a confused story about being a witness to a shooting. He was released to his mother's custody, but was rearrested three days later, arraigned for the murder of Hernandez, and remanded without bail. On October 31, 1978, he was indicted on two counts of murder in the second

degree. Bail was eventually set at $5,000 and later raised to $15,000. Unable to make bail, defendant remains incarcerated.

Notwithstanding a newspaper strike in New York City, defendant's initial court appearances received extensive coverage on television and radio, and in the non-striking newspapers. It was reported that he was the first juvenile to be charged with murder under the State's "tough new juvenile crime law" and the youngest person ever so to be charged in the State of New York. This coverage continued with his subsequent arraignment on the indictment. One of the newspaper articles carried the headline "He's a killer! Widow in court outburst!"

A hearing was scheduled for March 19, 1979, on the admissibility of statements allegedly made by defendant to various police officers and assistant district attorneys. Although defendant originally spoke of being a witness to a murder, he apparently eventually implicated himself as an accomplice in the killing. Among those present in the courtroom on March 19th were reporters from Associated Press, United Press International, the New York Post and WPIX (Channel 11). Justifiably apprehensive of the prejudicial effect that widespread publicity would have on any potential jurors, especially in the light of the extensive publicity the case had generated in its earlier stages, defendant moved to bar the public and the press from the courtroom during the hearing. Trial Term denied the request and adjourned the hearing to the next day.

That evening various television and radio stations broadcast stories about a new crackdown by the Mayor of the City of New York on crime in the subways. Interspersed with these accounts were reports of defendant's

trial. The next morning, prior to the commencement of the hearing, the trial justice advised counsel that he had viewed a telecast the evening before about the efforts to increase police protection on the subways, which concluded with the comment "Too bad they didn't have that back in September when Davis allegedly participated in the killing of John Hernandez." The comment was followed by a showing of a wedding picture of the deceased Hernandez and his wife. The trial justice also stated that he had heard a radio report that morning that pre-trial hearings were being conducted in the Davis trial, and that the People would seek to introduce a videotaped statement by defendant in which he admitted to the killing of Hernandez. At about the same time that the trial justice was voicing these concerns the morning edition of that day's New York Post, carrying a story headlined "Videotape is Key in Teenager Trial", under an artist's sketch of defendant with his mother in the courtroom, was already on the newsstands.

Significantly, in attendance at the courtroom that morning were reporters from the Daily News, the Post, NBC, CBS, and UPI. Thus, before a single word of testimony had been taken, and when only a pre-trial hearing on a suppression issue was pending, the media were already flocking to the courtroom and the case itself was generating considerable publicity.

In the wake of this sudden burst of renewed publicity which had emerged overnight, the trial justice advised the parties that he would reconsider the application for closure, noting that the first he had heard of the videotaped confession was on the morning radio report. An opportunity to argue in opposition was given not only to the People, who had opposed the motion the day before, but also to the

press, which, after a recess for the purpose of contacting counsel, had an attorney present to present its position.

Following argument, the trial justice ordered that the press and the public, except for the immediate members of the family of defendant and the victim, be excluded from the courtroom during the suppression hearing, but offered to make available daily copy of a transcript of the proceedings, redacted to omit any statements attributed to defendant. He also granted a stay pending review by this Court of his order.

At the outset, it ought to be recognized that this is not the ordinary, garden-variety street crime, as the dissent seems to suggest. The case has attracted widespread publicity. Defendant is the first thirteen year old to be prosecuted as an adult under the recently enacted amendments to the Penal Law dealing with juvenile crime. Moreover, he is charged with complicity in the vicious murder of a subway passenger on his way home from work. Because of its hybrid nature as a legal novelty and media sensation, the case is of great interest. In addition, at the time the hearing was to commence, public officials in the City of New York were engaged in a well-publicized campaign against crime in the subways, after the occurrence of a series of violent crimes. Obviously, this served to focus more attention on the prosecution of defendant.

The right to a public trial is not absolute and "must be balanced against other interests which might justify the closing of the courtroom to the public." (*United States ex rel. Lloyd* v. *Vincent*, 520 F.2d 1272, 1275.) Consequently, closure of a courtroom has been permitted even over the wishes of a defendant. "The public trial concept . . . has never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum, to protect the rights of parties and witnesses, and generally to further the administration of justice." (*People* v. *Jelke*, 308 N.Y. 56, 63, citations omitted.) Here, it is defendant who has made the motion to close the courtroom for what is, undeniably, a legitimate interest, the protection of his right to a fair trial. Like the accused in *Gannett Co.* v. *DePasquale*, (43 NY2d 370), he has asked the court "to insure that further pre-trial publicity would not impermissibly alter [his] status in the public eye from that of a suspected killer to that of a confessed murderer." (Id. at 378.)

At this stage of the criminal prosecution defendant's reasons for keeping any confession or statement from public knowledge are twofold. He seeks to prevent disclosure to potential jurors of the contents of any tainted confession which he is successful in suppressing.* Clearly, "[s]uppressed evidence should not be used to determine a defendant's guilt, not at trial and certainly not before trial through publication of illegally obtained evidence by the media . . . ." (*Gannett Co.* v. *DePasquale*, 43 NY2d *supra* at 379.)

The closure here is a limited one. As soon as a jury is impanelled and, if necessary, sequestered, or the circumstances are such that the probability of a suppressed confession prejudicing defendant no longer exists, the press will be able to publish whatever it chooses about the suppression hearing. On the other hand, permitting courtroom access to the media, with its capacity to disseminate

* Since, apparently, the People's case consists chiefly of defendant's admissions, the importance of keeping them from publication cannot be overstated.

the details of defendant's confession to every prospective juror in Bronx County, whatever its population, creates a reasonable probability of prejudice which would threaten the impaneling of a constitutionally impartial jury. (See, *Gannett Co.* v. *DePasquale,* 43 NY2d 370, *supra* at 380.)

Even should none of the statements be suppressed, defendant has an interest in keeping from prospective jurors the fact that a judge has already found his statements voluntary and constitutionally sanctioned as evidence. This is a material and realistic concern.

The dissent perceives the risk of prejudice as minimal, when balanced against the public's right to know "how the new juvenile offender statutes are working in practice, including the applicability of suppression issues to cases where the defendant is 13 years old." It is difficult to appreciate how a temporary delay in reporting the details of a confession denies that right. In any event, at the fulcrum of any balancing of these competing interests should be the recognition that there are, or will be, innumerable trials to avail the public of its right to know. On the other hand, defendant, whose liberty is at stake, has only one trial.

The dissent seeks to distinguish *Gannett* by pointing out that the victim there was a public official and locally prominent, whereas the crime involved here is not uncommon in Bronx County. Although, unfortunately, murder is not that rare an occurrence in Bronx County, it is equally true that the increasing incidence of violent crimes has made its residents acutely crime conscious and concerned for their personal safety. This is no doubt true of all large urban centers. This concern is reflected in the legislature's recent amendment of the Penal Law to provide for adult treatment of juveniles such as defendant, along with the

public outcry for increased police protection and stricter punishment, including the death penalty. Daily, the focus of the media is on violent crime and its effects, e.g. desolated streets, deteriorating neighborhoods, unsafe subways, and frightened citizens. The public is concerned with violent crime because it is affected by it, and, hence, the report of a 13 year old boy armed with a gun on a subway would command a significant amount of individual attention. With morning and afternoon newspapers, around-the-clock radio, and at least seven major television stations, it is highly unlikely that the details of a confession to what was apparently a cold-blooded and vicious crime will escape the attention of most potential jurors in Bronx County, an area which has been battered by the trauma of violent crime. And the danger to defendant's right to a fair trial can all be avoided by withholding the details of any confession until such time as the danger that the verdict may be affected by their premature publication has passed. The precedent exists. The Court of Appeals in *Gannett, supra,* expressly sanctioned closure as a discretionary power in the hands of a trial judge so that he might fulfill his affirmative obligation to insure a proper balance between a defendant's right to a fair trial and the public's right to an open forum. And, in *Nebraska Press Assn.* v. *Stuart* (427 U.S. 568) the United States Supreme Court intimated that closure was a respectable alternative:

> *The County Court could not know that closure of the prelimnary hearing was an alternative open to it* until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint. (p. 568—emphasis added.)

In this regard the *Gannett* Court fixed the judicial responsibility:

> To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced. To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings (citation omitted). At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public. (*Supra* at 380.)

At this point we can only speculate as to how much publicity the case will attract. But one fact seems eminently clear. The level of publicity which the dissent would require before the remedy of closure is invoked is precisely the danger that defendant is trying to avoid. And it is small succor to him to suggest an adjournment between hearing and trial to allow the residual effect of any adverse publicity to abate. Defendant has been incarcerated since last September and he has a constitutional right to a speedy trial.

Closure has one other benefit. In the event of a conviction it obviates the necessity of a retrial, mandated because the adverse effects of publicity, which could have been avoided, resulted in the denial of a fair trial.

Finally, as commendable as is the dissent's concern that approval of this order would set a precedent for closure in a significant number of cases where there is only minimal publicity, it fails to take into account the discernment

and sensitivity of our trial judges. The concept of a public trial is fundamental to our system. Closure is a drastic remedy, reluctantly invoked in any case, but necessary in those cases where the right to a fair trial, equally fundamental, is jeopardized.

Accordingly, inasmuch as Trial Term properly exercised its discretion, the application for an order in the nature of prohibition, pursuant to Article 78 of the CPLR, should be denied and the petitions dismissed, without costs or disbursements.

All for Opinion by Sullivan, J., including Sandler, J.P., and Lupiano, J., who also concur in separate Opinions. Silverman and Ross, JJ., dissent in an Opinion by Silverman, J.

Opinion of Sandler, J.P. (Concurring)

5074—*Matter of Merola* v. *Bell*
5075—*Matter of New York News, Inc.* v. *Bell*

SANDLER, J. (concurring):

The question presented is both close and difficult. However, I find the analysis set forth in Judge Sullivan's opinion compelling and ultimately unanswerable.

The public right to know the details of a confession that may ultimately be judicially determined to have been unconstitutionally obtained seems to me to be outweighed by the defendant's right to a fair trial, particularly where the defendant is 13 years old.

Opinion of Lupiano, J. (Concurring) (pp. 22-23)

5074—*Matter of Merola* v. *Bell*
5075—*Matter of New York News, Inc.* v. *Bell*

LUPIANO, J. (concurring):

I concur in the rationale set forth in the majority opinion of Justice Sullivan and add the following observations: First, in *Matter of United Press Ass'ns* v. *Valente,* 308 N.Y. 71, 77 (1954), the Court of Appeals declared that

> "(t)he courts have ever been alert to strike down any infringement or limitation upon the fundamental right of the press freely to publish and distribute news and comments (citations), and we certainly have no disposition or purpose to undermine or minimize it. That right has, however, never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others. Judicial proceedings are viewed as 'a public event', in the sense that 'Those who see and hear what transpired can report it with impunity'. (citation.) But freedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to 'see and hear what transpired'."

Second, the broad holding of *United Press, supra* has not been departed from (See, *Matter of Oliver* v. *Postel,* 30 N.Y.2d 171, 179 [1972]). Third, acknowledgement of the critical importance of harmonizing the First Amendment's guarantee of free press and the Sixth Amendment's guarantee of fair trial prompted the organization of the Fair Trial Press Conference in 1969. The Conference guidelines recognize that

> "'(a)ll concerned should be aware of the dangers of prejudice in making pretrial disclosure'"

and go on to state that

> "'(t)he public disclosure of [certain matters] may be highly prejudicial without any significant addition to the public's need to be informed'" (See, *Matter of Oliver* v. *Postel, supra* at p. 181, footnote 3).

Fourth,

> "*Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly* and not to be unjustly condemned (*Estes* v. *Texas,* 381 U.S. 532, 539; 1 Cooley, Constitutional Limitations [8th ed.], p. 647) and concomitantly, serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet* (citations)" (*People* v. *Hinton,* 31 N.Y.2d 71, 73 [1972]) (Emphasis supplied).

The aforementioned enumerated observations impel the conclusion that the instant matter is one requiring scrupulous safeguarding of the defendant's *primary* right to a fair trial. The *limited* closure herein is clearly warranted, and as so aptly remarked by the Court of Appeals in *Gannett Co.* v. *DePasquale,* 43 N.Y.2d 370, 380 (1977):

> "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced."

I also would endorse Trial Term's order as a proper exercise of discretion.

Dissenting Opinion of Silverman and Ross, JJ. in Opinion by Silverman, J. (pp. 24-30)

5074—*Matter of Mario Merola* v. *Hon. Howard E. Bell*
5075—*Matter of New York News, Inc.* v. *Hon. Howard E. Bell*

SILVERMAN and Ross, JJ. dissent in opinion by SILVERMAN, J.:

The District Attorney of Bronx County and New York News, Inc., publisher of a daily newspaper, bring these Article 78 proceedings in the nature of prohibition against respondent Hon. Howard E. Bell, a justice of the Supreme Court. Justice Bell is presiding in the Supreme Court, Bronx County in a certain criminal action, including a suppression hearing, in which the defendant, a thirteen year old boy, is charged with murder under the recent juvenile offender statutes, L.1978, ch.481. The petitions seek to prohibit Justice Bell from excluding the press and the public from the pretrial suppression hearings, pursuant to Justice Bell's oral order to that effect. Justice Bell stated, however, that he would permit redacted transcripts of the proceedings during the pretrial proceedings to be made available assuming redaction could be arranged by the District Attorney and the defense attorney.

Justice Bell's direction to close the courtroom was made on application of the defendant and after appropriate notice not only to the District Attorney but to the representatives of the press; and there is only praise by all parties for the justice's sensitive regard for the procedural regularity of his actions.

The controlling case in the area, to the extent that it is applicable, is *Matter of Gannett Co., Inc.* v. *DePasquale,* 43

N Y 2d 370 (1977). In that case, the majority said with respect to a suppression hearing:

> "To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings . . . .
>
> As the locus of public interest, this determination is to rest with the hearing Judge." (43 N Y 2d at 380)

"[P]rohibition is available both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction . . . . If . . . appeal or other proceedings would be inadequate to prevent the harm, and prohibition would furnish a more complete and efficacious remedy, it may be used even though other methods of redress are technically available . . . ." *LaRocca* v. *Lane,* 37 N Y 2d 575, 578-80 (1975). The present case appears to fit within those categories that permit prohibition.

A number of the cases reviewing the closing of courtrooms by a judge have come up on Article 78 proceedings. *Matter of Gannett Co., Inc.* v. *DePasquale, supra; Matter of Oliver* v. *Postel,* 30 N Y 2d 171 (1972); *Matter of United Press Assns.* v. *Valente,* 308 N Y 2d (1954).

None of the parties objects to our assuming jurisdiction in this matter. And the trial justice has almost explicitly requested us to do so, saying that he thought the matter should go to the Appellate Division, and staying the proceedings before him pending these proceedings. In the circumstances, it is appropriate for us to accept jurisdiction at this stage of the proceedings with respect to the particular order here sought to be reviewed.

As to the merits: We are of course bound by the decision of the Court of Appeals in *Matter of Gannett Co., Inc.* v. *DePasquale, supra.* The majority of the Court said:

> "At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.
>
> . . . Of primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial." (43 N Y 2d at 380)

Thus, in the tension between the public's right to know what goes on in its courts and the public's interest to avoid any developments that would threaten the defendant's right to a fair trial, substantial doubts are to be resolved in favor of protecting the fair trial.

But this is not to say that the long standing tradition of open public hearings is to be accorded no weight. The court said that the magnitude of any genuine public interest "may be found to outweigh the risks of premature disclosure." *Id.* at 381. Thus a balancing of the conflicting considerations is still required.

Public knowledge of what transpires at suppression hearings is an important value. It adds to public understanding of why confessions and other important evidence are or are not suppressed by the courts, whether or not the evidence is reliable. And such public knowledge casts light on the conduct of police, prosecuting authorities and defense in the early stages of criminal cases. See Comment, *The Right to Attend Criminal Hearings,* 78 Colum. L. Rev. 1308, 1310-11 (1978). And the public has a right to know how the new juvenile offender statutes are working in prac-

tice, including the applicability of suppression issues to cases where the defendant is 13 years old.

Against these considerations is the risk that evidence—here apparently confessions—which ultimately may be suppressed will still come to the attention of prospective jurors through widespread publicity as to proceedings on the suppression hearing.

Applying the balancing test prescribed by the *Gannett* case, we do not think that the risk of prejudicing the defendant's right to a fair trial is great enough to warrant closing the courtroom in the present case.

The *Gannett* case involved a trial in Seneca County with a population of 36,000 people; a murder of a prominent citizen and public official; and proceedings which had been the subject of intensive, prolonged and pervasive publicity.

In the case at bar, the county is Bronx County with a population of approximately 1½ million; the crime is unfortunately not an uncommon one in the City of New York or in Bronx County,—robbery and a murder in the course of the robbery. The crime is alleged to have taken place in the subway, and at the moment subway crime is receiving increased publicity. Neither the defendant nor the victim is a prominent public figure; there is nothing to indicate that either one of them is widely known.

All that distinguishes this case from many other such cases is that this is said to be the first prosecution of a thirteen year old for murder in the felony courts under the new juvenile offender law. And even that is probably no longer true. We read in the newspapers that there are other such prosecutions in progress; this Court had another such case on its calendar a week after this one.

We have examined the publicity in this case. It is not nearly comparable in scope with that in the *Gannett* case. Indeed, the trial justice recognized this fact, saying:

> "I will concede or agree with you there hasn't been that much publicity with respect to this case. We haven't had the glaring headlines that you would receive in certain cases.
>
> My concern, for instance, if we were in the process of selecting a jury today, there's no question in my mind that we could obtain a jury. I'm only anticipating, I'm not concerned about that. I'm anticipating now, this is what bothers me mostly. I don't know what the press is going to do tomorrow or this afternoon . . . ."

All of us on this bench have sat as trial judges in criminal cases in the City of New York. And we must all have been struck by the fact that even in cases where there has been very widespread publicity, many prospective jurors have never heard of the case. Indeed, it has been commented that in the famous Watergate cases an astonishing number of prospective jurors said that they had never heard of the case. *Cf. State* v. *Joyce,* —— N J Super. ——, 4 Media L. Rptr. 1419, 1423 (June 28, 1978), where in a county with a population of 320,000, after almost daily newspaper, television and radio reports of a pretrial suppression hearing, in a case involving alleged misconduct in office, perjury etc. by well known local political figures, only three of 102 prospective jurors stated they had read or heard of the case.

On the present record, we, like the trial justice, have only our own experience to go on. In this case, with its characteristics and the present and reasonably foreseeable level of publicity, we doubt that more than a small per-

centage of prospective jurors will even have heard of the case. We do not believe that opening the suppression hearings will significantly increase the difficulties of obtaining an impartial jury,—especially if a week or two were allowed to elapse between the close of the suppression hearings and the commencement of jury selection.

Any prediction of course is subject to error. But in our judgment the risk of prejudicing the trial is sufficiently minor so that we think the courtroom should not be closed. If the present state of facts requires closing the courtroom during the suppression hearing, we fear that it would be necessary to close the courtroom in a high percentage of suppression hearings in cases where there is any publicity at all.

Our dissent is not based on the view that other remedies are available. As the Court of Appeals said in the *Gannett* case, *supra,* 43 N Y 2d at 380:

> "Continuance, excessive *voir dire* examinations, limiting instructions or venue changes may prove paltry protection for precious rights. . . ."

And the practical difficulties of these palliatives in themselves are serious hindrances to the administration of justice. Our dissent is based simply on our view that the risk that press commentary on these hearings will threaten the impaneling of a constitutionally impartial jury in this case is not enough to warrant closing the courtroom.

We do not mean to limit the power of the justice presiding at the hearing or the trial to take appropriate future action, including closing the courtroom, as the case and the publicity concerning it develop. We only say that at this stage, the hearing should not be closed.

We would grant the petitions and direct judgment under Article 78 directing respondent not to close the courtroom during the suppression hearing, without prejudice to the power of respondent, or his successor at a suppression hearing or trial, to close the courtroom, if, in his judgment, circumstances as they develop require or warrant such closure.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
NOV 5 1979
MICHAEL RODAK, JR., CLERK

No. 79-489

MARIO MIROLA,

Petitioner,

against

Hon. HOWARD E. BELL and ROBERT DAVIS,

Respondents.

No. 79-561

NEW YORK NEWS, INC.,

Petitioner,

against

Hon. HOWARD E. BELL and ROBERT DAVIS,

Respondents.

MEMORANDUM OF JUSTICE BELL IN OPPOSITION TO PETITIONS FOR CERTIORARI

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MEMORANDUM OF JUSTICE BELL IN OPPOSITION TO PETITIONS FOR CERTIORARI

Questions Presented

1. Whether review should be denied where the decisions below, affirming the closing of a pretrial suppression hearing to the press and public, were consistent with this Court's decisions and were based on concurrent

findings of fact by two courts, the trial court and the Appellate Division, which the Court of Appeals of the State of New York found not to constitute an abuse of discretion?

2. Whether review should be denied because this case is not urgent and does not present novel questions while this Court has before it another case, *Richmond Newspaper, Inc.* v. *Virginia,* No. 79-243, in which such questions may properly be addressed?

Prefatory Statement

This Memorandum is submitted on behalf of Justice Bell in opposition to the petitions for writs of certiorari of Mario Merola, District Attorney of Bronx County, New York ("Merola"), and of New York News, Inc. ("News"), to review judgments of the Court of Appeals of the State of New York entered July 9, 1979. The judgments affirmed the denial of petitions by Merola and the News for writs of prohibition against Justice Bell to prohibit him from closing a pretrial suppression hearing to the press and public. *Matter of Merola* v. *Bell,* 47 N Y 2d 985 (1979), aff'g 68 A D 2d 24 (1st Dept. 1979).

Respondent Justice Bell has no personal interest in the instant litigation. He specifically encouraged petitioners to seek a State appellate court review of his ruling closing the pretrial hearings to the public, except immediate members of the defendant's and the victim's families, and to the press, while permitting daily release of transcripts of the hearing, after redaction by counsel,* with complete transcripts to be made available when defendant could no longer be prejudiced by them.

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* In its affirmance, the Court of Appeals advised that redaction was a non-delegable responsibility of the hearing court. 47 N Y 2d at 986.

On consent of all parties, Justice Bell granted a stay until their petitions were finally decided* in order to protect the public's interest in a trial open to the press and respondent Davis' ("defendant Davis") interest in a fair trial, free from prejudicial publicity (R.** 131-3).

Defendant Davis is the first 13 year old to be tried in adult criminal court under the 1978 amendments to New York's Penal and Criminal Procedure Laws. It was his motion to exclude the press from the pretrial suppression hearing upon which Justice Bell ruled.

The facts of the case are well set out in the majority opinion of the Supreme Court of the State of New York, Appellate Division, First Department, 68 A D 2d at 25-7. It should be emphasized that, as discussed below at p. 12, both the trial court and the Appellate Division made independent but concurrent findings of fact which were found not clearly erroneous by the Court of Appeals. Since both petitioners base their arguments in part on a tacit controvertion of the findings of the Courts below as to the extensiveness of publicity in this case and the manner in which the trial court exercised its discretion (Merola Petition at 14; News Petition at 11-12, 16), the Attorney General will summarize the evidence upon which those findings were based.

A. Extent of Publicity.

There was abundant evidence, most of it ignored by petitioners in their papers in this Court, that the case had "attracted widespread publicity," 68 A D 2d at 27.

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* The Court of Appeals "caution[ed] that the right of the defendant to a speedy trial is important and should not be sacrificed in the name of these collateral appeals." 47 N Y 2d at 987-8. That caution was a general advisory note for other trial courts in similar situations and not applicable herein since the defendant had waived his speedy trial rights by consenting to the stay.

** Reference is to the Record on Appeal in the Court of Appeals.

In considering the level of publicity, it is important to note that the Record does not contain all of the news coverage of this case. Counsel for defendant Davis had included ten *illustrative* articles from the daily press in his Affirmation in Answer to the Petitions (R. 212-3, 218-27), but made no pretense of completeness. The most obvious omission from the Record was any attempt to quantify broadcast coverage of the proceedings.

The Record shows that the March 19-20, 1979, hearing was covered in one newspaper story and at least four radio and two television reports (R. 213). Using this one to six ratio of newspaper to broadcast coverage as a basis, the fact that there had been more than ten newspaper articles before the March 19-20 hearing would suggest over sixty electronic media reports before then. Accordingly, as of March 20th, the Record documents at least eleven newspaper articles, four television reports and two radio stories; it indicates that there were several other newspaper articles; and it supports a reasonable estimate of at least sixty other electronic media reports.*

Considering the newspaper and broadcast coverage of just the March 19th hearing, over half the households in the Bronx were exposed to stories about it in that twenty-four hour period alone.** Continued coverage over a

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* Although the six to one ratio of broadcasts to articles may at first seem out of proportion, the actual number of electronic media reports is probably *under* rather than over-estimated. The Davis case was the type of story that lent itself to quick, short, broadcast coverage. It was reported by the wire services which provide hourly bulletins to the more than seventy radio and thirteen television stations, *Standard Rate and Data Service, Inc.* (April 1979) at 600, serving New York City. On the "all news" stations, at least, any one story was likely to be repeated several times.

** This estimate is based on the newspaper circulation, *Circulation 78/79*, at 527, and radio and television audience figures, *Nielsen* (Feb. 1979); *ARB* (Jan. 1979), for the specific news-

(footnote continued on following page)

three or four day suppression hearing (R. 131) could reasonably have been expected to reach virtually every Bronx adult.

There was thus ample reason for Justice Bell to comment that "this case, of course, was extensively covered by the press at the time the defendant was arraigned in this Courtroom in November of 1978. . . ." (R. 113). As Justice Sullivan summarized it, 68 AD2d at 25:

> "Notwithstanding a newspaper strike in New York City, defendant's initial court appearances received extensive coverage on television and radio, and in the nonstriking newspapers. It was reported that he was the first juvenile to be charged with murder under the State's 'tough new juvenile crime law' and the youngest person ever so to be charged in the State of New York. This coverage continued with his subsequent arraignment on the indictment. One of the newspaper articles carried the headline 'He's a killer! Widow in court outburst!' ".

The publicity in *Matter of Gannett Co.* v. *De Pasquale*, 43 N Y 2d 370 (1977), aff'd —— U. S. ——, 47 USLW 4902 (July 2, 1979), was found pervasive based on continuing coverage in the local press, sometimes on the front page, and on the local networks. In the Davis case, the articles were not on the front page, but the known television broadcasts were on prime time evening news and the known radio broadcasts were on prime time ("drive time") morning

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(footnote continued from preceding page)

papers and programs known to have reported the hearing. A statistical adjustment has been made on the assumption that a random number of persons exposed to one report will also have been exposed to another report from a different source. Thus, the estimate that over half the county's households were exposed to at least one report of the hearing includes a substantial number of households that were exposed to two or more such reports. It is an unduplicated, not a cumulative estimate.

news. Whenever court action took place in this case, at arrest, at arraignment, and again at the pretrial proceedings, the press covered it.

Attempts by petitioners in this Court to rely on supposedly limited publicity at the case's initial stages ignore the crucial fact that although the major newspapers were then on strike, the interim newspapers nonetheless gave the story extensive coverage. See illustrative stories at R. 218-26. Moreover, by the time of the pretrial hearing, the major dailies had resumed publication. Attempts by petitioners to rely on the lack of publicity between arraignment and the March 19th hearing likewise ignore the crucial fact that there had been nothing for the press to report during that period. But on the first occasion after the major newspapers resumed publication that there was a newsworthy event, representatives from television station Channel 11 (R. 40-1), radio station WNBC (R. 41), CBS News (R. 60), television station WABC Eyewitness News (R. 139), United Press International (R. 60, 69), the News itself (R. 70), the New York Post (R. 78), and other unidentified members of the press, attended, presumably with the intention of filing stories. Of these, at least Channel 11, WNBC and the Post had broadcast or published stories within twenty-four hours of the March 20th hearing (R. 40-1, 139). If it had been possible to monitor all the electronic media, undoubtedly much more news coverage could be cited. See, pp. 4-5, *supra.*

Clearly, the Davis case was receiving as extensive publicity as in *Gannett.* The presence at the March 20th hearing of so many reporters from so many news sources presented Justice Bell with a clear and present danger of more publicity of the same character.

Indeed, the peculiarly prejudicial way in which the press on March 19-20th was linking the Davis case with independent acts by others in similar settings made the need to exclude the media even stronger than in *Gannett.*

As Justice Sullivan noted, 68 A D 2d at 26:

> "That evening [March 19] various television and radio stations broadcast stories about a new crackdown by the Mayor of the City of New York on crime in the subways. Interspersed with these accounts were reports of defendant's trial. The next morning, prior to the commencement of the hearing, the Trial Justice advised counsel that he had viewed a telecast the evening before about the efforts to increase police protection on the subways, which concluded with the comment 'Too bad they didn't have that back in September when Davis allegedly participated in the killing of John Hernandez.' The comment was followed by a showing of a wedding picture of the deceased Hernandez and his wife. The Trial Justice also stated that he had heard a radio report that morning that pretrial hearings were being conducted in the Davis trial, and that the People would seek to introduce a videotaped statement by defendant in which he admitted to the killing of Hernandez. At about the same time that the Trial Justice was voicing these concerns the morning edition of that day's New York Post, carrying a story headlined 'Videotape is Key in Teenager Trial', under an artist's sketch of defendant with his mother in the courtroom, was already on the newsstands."

Justice Bell noted that the press was explicitly identifying the Davis case as a "subway crime" (R. 114-6). The pervasive publicity about "subway crime" was creating a situation in which it would be increasingly difficult to ensure a fair trial for persons accused of a "subway crime." The use by the press of Davis as the exemplar of "subway crime" risked his being identified in the public mind with every other such case reported.

Under *People* v. *Moore,* 42 N Y 2d 421, 433, cert. den. 434 U.S. 987 (1977), Justice Bell had to consider possible

prejudice to defendant Davis from reference to his pending prosecution in articles about similar crimes. While Justice Bell correctly found (R. 101-2) that the publicity to date would not prevent a fair trial, he had to consider both the publicity about the Davis case and publicity about similar crimes which the press had linked to it in evaluating the type of publicity that might reasonably be foreseen over the suppression hearing.

A further factor supporting the finding of the Courts below as to the likelihood of prejudice based on the reasonably foreseeable publicity was the nature of the evidence to be considered at the suppression hearing. In closing the hearing, Justice Bell was concerned with not merely one or two pieces of tainted evidence that might have to be excluded in a one day hearing. Rather, he faced a three or four day hearing on the admissibility of a series of five cumulative statements, all of which the District Attorney intended to introduce at trial (R. 58-9, 131). Justice Bell was particularly concerned that one statement was on videotape. As he said,

> ". . . frankly as a profession[al], and you are a professional in the field of law, videotapes are very impressive. Frankly, they are more impressive than a policeman getting on the stand testifying that this man told me, 'yes, I did it.' When you sit in a courtroom and look at that man on the t. v. camera, and he said yes . . . If you have laymen over there who have not seen these videotape confessions, they may be over-impressed by it, and the[y] will say, 'here's a man, I watched him on t.v.,' and that looks like a regular t.v., 'I watched him on t.v., he was cool, he was calm as he told that story, no question in my mind that he understood what he was doing, no question in my mind about that,' and your paper, not your paper but the press really should headline—this is what gives me, and it's my problem. . . ." (R. 92-5).

Justice Bell was clearly concerned that the videotape is a uniquely prejudicial piece of evidence. He believed there was a real danger that it would be given excessive weight by the press, leading them to give additional prominence to the story. He was explicitly concerned that this type of publicity might cause prospective jurors to lie about their prior knowledge of the case or to swear falsely that they would wipe it from their minds (R. 95-7).

B. Exercise of Discretion.

The thoroughness with which Justice Bell explored alternatives to cloture is ample demonstration that he carefully exercised his discretion.

He specifically authorized the families of the defendant (other than the mother, who was to appear as a witness) and the deceased victim's wife to remain during the hearing (R. 117-9). He specifically agreed to "make available redacted transcripts of the proceedings during the pretrial motions" (R. 117).

He conscientiously explored several other alternatives with petitioners and defendant (R. 122), although under *Gannett* he did not have to, 43 N Y 2d at 380. The possibility of continuance was eliminated because of the Assistant District Attorney's pregnancy (R. 127-8) and the defendant's right to a speedy trial (R. 125-6). Justice Bell's suggestion that he might initially open the hearings to the press and close them if prejudicial publicity occurred, adjourning for a few months, was rejected for the same reasons (R. 125-8).

The trial court did not explore change of venue because it would clearly be more prejudicial to the defendant than the publicity. As defendant's counsel argued, defendant Davis was only 13 years old and needed the support of his family in court (R. 79-80); concurring opinion of SANDLER, J., 68 A D 2d at 30. But only those family members who were to be witnesses, and who therefore would be excluded

from most of the trial, would have had their expenses paid to attend if venue was changed from the metropolitan area that had been blanketed with publicity about the case.

Voir dire and limiting instructions were properly rejected since Justice Bell had cause to believe they would not adequately protect the impartiality of the jury (R. 95-7). Sequestration of the jury was not explored since no jury had been chosen and sequestering a jury panel of one or two hundred people is impracticable. Nor would it be practical to choose a jury in advance of the hearing and sequester it: there might well be an appeal over the suppression of evidence at the hearing. Criminal Procedure Law §§ 450.20, 450.50, 710.20. Discharging the jury during the appeal would cause problems of double jeopardy, sequestering them for so long a period would be likely to prejudice them, and releasing them during the appeal would expose them to prejudicial publicity about "subway crime" in general and the Davis case before trial.

The order granted by Justice Bell was thus narrowly drafted and well within his discretion. It gave the public and press full access to the trial and only partially limited their access to the suppression hearing.

C. Conclusion.

There was thus substantial convincing evidence in the record before the three Courts below to support their findings of extensive publicity to date and a likelihood of further widespread publicity of a prejudicial nature if reports of the pretrial hearing were published before the jury was impanelled. Based on that record, the order for cloture, after consideration of alternative means of protecting societal interests, was a reasonable exercise of discretion.

POINT I

Review should be denied of petitioners' First and Sixth Amendment claims because the decisions below, affirming the closing of a pretrial suppression hearing to the public and the press, were consistent with this Court's decisions and were based on concurrent findings of fact by two Courts, the trial court and the Appellate Division, which the Court of Appeals of the State of New York found not to constitute an abuse of discretion.

In *Gannett Co.* v. *De Pasquale,* —— U.S. ——, 47 USLW 4902 (July 2, 1979), this Court affirmed the closing of a pretrial suppression hearing to the press and public. It held that the Sixth Amendment right to a public trial was conferred only on a criminal defendant, 47 USLW at 4707, and that even if the Sixth Amendment, through the Fourteenth Amendment, "could properly be viewed as embodying the common-law right of the public to attend criminal trials," that right did not extend to pretrial proceedings which "were never characterized by the same degree of openness as were actual trials," *id.* (footnote omitted). The Court found it unnecessary to address the question of the petitioning newspaper's putative First Amendment right, through the Fourteenth Amendment, to access to the pretrial proceeding where the denial of access was temporary and the trial court had held a hearing at which it balanced the competing social interests in access with the defendant's right to a fair trial. 47 U.S.L.W. at 4908-9.

In the present case, the denial of access was similarly limited, 68 A D 2d at 28, and followed a trial court hearing addressed to the same First and Sixth Amendment concerns, *id.* at 26-7.

The present writs of prohibition originated in the Appellate Division which thus was sitting as a court of first

instance and properly made its own findings of fact in reviewing the trial court's ruling on the law and on the facts, New York Civil Practice Law and Rules § 7803. Based on its own review of the record, the Appellate Division found substantial evidence to support the trial court's ruling and upheld it as a reasonable exercise of discretion. 68 A D 2d at 30. The fact that the dissenting Justices argued cloture was an abuse of discretion, 68 A D 2d at 35-6, shows that the issue was firmly in contention.

In the Court of Appeals, where the issue of discretion was briefed (Brief for Respondent-Respondent Justice Bell at 19-23) and addressed at oral argument, the Court affirmed. Its decision amounted to a holding that the trial court's exercise of discretion was not contrary to the weight of the uncontroverted evidence as a matter of law.*

The decisions in this case on the First Amendment claim thus clearly comport with this Court's decision in *Gannett*. The trial court's cloture order was on motion of the defendant, followed a careful hearing directed at the competing social interests in press access to the pretrial proceeding and the defendant's right to a fair trial, and was limited both in duration and as to those excluded from the courtroom. See p. 2 *supra*. Here, as in *Gannett*, "the actions of the trial judge . . . were consistent with any right of access the petitioner[s] may have had under the First and Fourteenth Amendments," 47 USLW at 4908.

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* The New York Court of Appeals ordinarily reviews decisions of the courts below only on the law. Where, however, it is claimed that the trial court's exercise of discretion was clearly contrary to the weight of the uncontroverted evidence, a matter of law is presented for review. Cohen & Karger, *Powers of the New York Court of Appeals* (1952) § 158, at 614-9, and cases cited. Cf. *Krichmar* v. *Krichmar*, 42 N Y 2d 858, 860 (1977). Its affirmance herein thus amounts to a holding that the trial court's exercise of discretion, as approved by the Appellate Division, was not clearly contrary to the weight of the uncontroverted evidence.

The decisions herein on petitioners' Sixth Amendment claim were likewise consistent with *Gannett*. While this Court did not specifically address the Sixth Amendment claim of a prosecutor on behalf of the public to a pretrial hearing open to the press and general public, *Gannett* clearly held that any such right was personal to the defendant, 47 USLW at 4707-8. Since the defendant herein sought cloture, neither the newspaper nor the prosecutor could invoke his constitutional right to an open hearing over his objection. See *Rakas* v. *Illinois*, 439 U S 128, 132 n.2 (1979); *McGowan* v. *Maryland*, 366 U S 420, 429 (1961), citing *United States* v. *Raines*, 362 U S 17, 22 (1960), and *Tileston* v. *Ullman*, 318 U S 44, 46 (1943). See also *Donaldson* v. *United States*, 400 U S 517, 530 (1971); *United States* v. *A. L. Burbank & Co., Ltd.*, 525 F 2d 9, 17 (2d Cir. 1975).

Assuming *arguendo* that petitioners could raise a Sixth Amendment claim, this Court's decision in *Gannett* clearly shows that the claim would be rejected. The Court specifically noted that, 47 U.S.L.W. at 4906 n. 12:

> "The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same dual obligation."

In *Gannett*, the "public interest [was] fully protected by the participants in the litigation," *id.* at 4906.

In the present case, the trial court heard argument from the newspaper, prosecutor and defendant on the Sixth Amendment issue. Its decision was approved on the law and the facts and as a reasonable exercise of discretion by the Appellate Division. The Court of Appeals affirmed, having rejected the claim of abuse of discretion. Thus, the public interest was adequately protected under this Court's standard in *Gannett*.

This Court has noted:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

Moreover, this Court has held that it

> "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949). Accord, *United States* v. *Ceccolini,* 435 U.S. 268, 273 (1978); *Berenyi* v. *Immigation Director,* 385 U.S. 630, 635 (1967).

As shown above, the trial court's cloture order was based on substantial evidence of widespread publicity and potential prejudice. That holding was affirmed on the law and the facts by the Appellate Division. Any hypothetical error in it was found not to amount to an abuse of discretion by the Court of Appeals.

The cloture decision came within the law as later enunciated by this Court in *Gannett.* It was based on concurrent findings of fact by two courts and found not to be clearly erroneous by a third court. Under this Court's standards for granting writs of certiorari, review should be denied.

POINT II

Review should be denied because this case is not urgent and does not present novel questions. Moreover, this Court has before it another case in which such questions may properly be addressed.

Defendant Davis' guilty plea without a pretrial suppression hearing removes the urgency from this case. He has received a restrictive placement disposition pursuant to Family Court Act § 753-a for a designated Class A felony

act under which he will be held in a secure juvenile facility for at least eighteen months and may be retained in custody until his twenty-first birthday. While we believe the decisions below would be upheld if this Court granted review, it is important to note that even a reversal herein would not entitle defendant Davis to a new trial, much less to go free.

Petitioners attempt to show their own need for review based on questions allegedly left open by *Gannett* that this case might answer. Merola Petition at 13-15; News Petition at 10-12, 19-21. But, as shown above, *Gannett* already provides sufficient guidance to answer those questions. Specifically, *Gannett* shows that the Courts below herein correctly approved the trial court's decision, after a full hearing, resolving the competing First and Sixth Amendment issues, even over the prosecutor's objections. See pp. 12-13 *supra.*

To the extent that a question was left open in *Gannett* as to the significance of the size of the jury pool, News Petition at 16-18, that was a factual issue resolved against petitioners by concurrent rulings of the three Courts below and not suitable for review. See p. 14 *supra.*

Petitioner News also suggests that *Gannett* left open the question of the appropriate standard to apply and that the decisions herein do not meet a reasonable probability of prejudice standard. News Petition at 12-16. But, as shown at pp. 3-10 *supra,* it was not clearly erroneous for the Courts below to find such a reasonable probability of prejudice based on the showing made by the defendant and after consideration of alternative remedies. The trial court's decision met Mr. Justice Rehnquist's broad standard of deference to the trial court's discretion, 47 U.S.L.W. at 4912; the reasonable probability standard of the Chief Justice and Justices Stewart and Stevens, *id.* at 4909; and Mr. Justice Powell's standard placing the burden on defendant to show a reasonable probability of

prejudice and consideration of less restrictive alternatives, *id.* at 4911. It thus comported with the *Gannett* standards enunciated by a majority of the Court and needs no review.

Even if this Court were prepared at this early date to reconsider *Gannett,* it has before it for decision this Term another case, *Richmond Newspaper, Inc.* v. *Virginia,* No. 79-243, review granted 48 U.S.L.W. 3241 (Oct. 9, 1979), which squarely frames the question of standards. Review of the instant case, which is not urgent and where review of most issues would be limited by the concurrent factual rulings of three Courts below, is thus unnecessary and inappropriate.

CONCLUSION

The petitions for writs of certiorari should be denied.

Dated: New York, New York
November 2, 1979.

Respectfully submitted,

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